Kepic v. Tecumseh Road Builders (Ont. C.A.), [1987] O.J. No. 890

Ontario Judgments

Supreme Court of Ontario - Court of Appeal
Toronto, Ontario
Brooke, Blair and Tarnopolsky JJ.A.
Heard: April 7 and 8, 1987
Judgment: October 5, 1987

[1987] O.J. No. 890 | 23 O.A.C. 72 | 18 C.C.E.L. 218 | 6 A.C.W.S. (3d) 305

Between Steve Kepic, Respondent, and Tecumseh Road Builders, a division of the Countryside Farms Limited, M.B.L. International Contractors Inc., Henry Marentette and Navarre Marentette, Appellants

Case Summary

Inducing breach of contract — Directors' liability where acting fraudulently.

The defendants appealed from a decision in which the corporate defendant was found liable for breach of contract and the personal defendants were found liable for inducing breach of that contract. The plaintiff had a good reputation as a contractor for demolition and salvage work. He was unable to obtain a salvage contract because of insufficient bond resources. The two defendant brothers owned construction companies. The plaintiff suggested that the brothers use one of their companies to bid on the projects. The plaintiff viewed his relationship with the companies as a joint venture. He signed an employment contract in which it was agreed that he would share equally in the profits. The defendant company was awarded the contract which turned out to be more profitable than expected. The brothers decided to terminate their relationship with the plaintiff and keep the profits for themselves. They terminated the employment contract and at trial gave false statements as to the amount of the profit. The trial judge found the company liable for breach of contract and the brothers personally liable for the tort of inducing breach of the contract.

HELD: The appeal was dismissed.

The directors of a corporation will not be liable for inducing that corporation to breach its contract when they are performing bona fide their functions as corporate officers. This is not the case where the director acts in a fraudulent manner. The directors acted fraudulently with the clear intention of depriving the plaintiff of his right to share in the contract profits. The trial judge was right in concluding that the brothers were personally liable for inducing breach of contract. In view of the fraud, costs were awarded on a solicitor and client basis.

Alan J. Lenczner and Harry Underwood, for the Appellants. Henry Lang, Q.C., for the Respondent.

The judgment of the Court was delivered by

BROOKE J.A.

The defendants, M.B.L. International Contractors Inc., Henry Marentette and Navarre Marentette, appeal from the judgment of Madam Justice McKinlay. The trial judge held defendant company liable in damages to the plaintiff for breach of contract and the personal defendants liable to the plaintiff in the same sum for inducing the breach by the company of the contract. It is conceded that there was not to be recovery against each of the defendants of the total sum resulting in double recovery, rather that the plaintiff was entitled only to recover the damages in the sum assessed.

The facts are complex and need not be repeated in detail. They are carefully set out in the judgment of the trial judge.

The dispute arises from the demolition and salvage operations performed upon the Great Lakes Power Corporation Limited power plant in Sault Ste. Marie, Ontario. One of the defendants at trial, Tecumseh Road Builders, a division of The Country Farms Limited ("Tecumseh"), was the contractor for the demolition and salvage. The entire project was in turn subcontracted to the second corporate defendant M.B.L. International Contractors Inc. ("M.B.L."). Both these corporate entities are controlled by two brothers, Henry Marentette and Navarre Marentette, the other defendants in the action.

Steve Kepic ("Kepic"), the plaintiff at trial and respondent in this court, has some 35 years experience in the demolition business. In June, 1980 he learned of the Great Lakes project and considered making a tender himself. When his bond resources proved insufficient for the tender, Kepic approached the Marentettes and suggested that one of their companies could successfuly bid on the contract. A successful tender was prepared and submitted in late November, 1980 using Tecumseh and M.B.L. The Marentettes were aware of Kepic's reputation and in the tender documents exaggerated his history with Tecumseh by saying he had been employed for two years when, in fact, he had not. It is clear that Kepic's reputation in the industry and his efforts in the preparation of the tender were instrumental in its acceptance by Great Lakes.

On March 17, 1981, after the tender was accepted and preparations for the project begun Navarre Marentette presented Kepic with a document purporting to be an "Employment Agreement". While Kepic viewed his relationship with the Marentettes and their companies as a joint venture he nonetheless signed the agreement. It provided, among other things, that Kepic was, "notwithstanding anything contained in [the] agreement", to receive one-half of the net profit from the demolition and salvage contract.

The demolition and salvage contract was a lucrative one. It was made more so by a decision to remove and sell the generators as working units rather than as parts or as scrap. Some time after realizing just how lucrative the project could be, the trial judge found, the Marentettes set about to end Kepic's involvement so that they might keep the profits for their own personal use.

Shortly after the demolition began in the summer of 1981, the relationship between the Marentettes and Kepic deteriorated. On September 8, 1981, a letter from the solicitors for M.B.L. was delivered to Kepic, giving him twenty-four hours notice of termination of his employment. The letter alleges several breaches of the employment agreement by Kepic and purports to dismiss him from his position as demolition site supervisor. Specifically, the letter alleges that Kepic had exceeded his authority by negotiating for the disposal of the generators being extracted from the demolition project, that he had failed to progress with the work of demolition in an expeditious fashion and that he had failed to meet the cash flow projections. The trial judge held that none of the alleged breaches had been made out. She did not believe the defendants'

evidence and after reviewing all of the evidence, concluded that Kepic had not breached his contract and that the purported dismissal was wrongful. As damages for this breach of contract she awarded Kepic one half of the net profits on the books of the defendants in the form of an interim judgment and ordered a hearing before the local judge at Sault Ste. Marie to determine the exact figure of actual profits, which figure would become the final judgment. Having regard to her careful examination of the evidence, the findings of credibility and facts that she made, I think these conclusions are unassailable.

Kepic also claimed that Henry and Navarre Marentette became personally laible when, having learned that the salvaged equipment from the Great Lakes contract was of substantial value, they induced the corporate defendant M.B.L. to breach the contract by discharging him. In doing so, they intended to deprive him of his half share of the profit under the employment agreement and keep it for themselves. Kepic's claim against the Marentettes is an action in tort, for inducing their breach of the contract. In considering this claim, the trial judge found that:

> [Henry and Navarre Marentette] acted in concert to cause M.B.L. to discharge Kepic and thus deprive him of his share of the contract profit.

She also found:

> I am satisfied that the Marentettes intentionally caused M.B.L. to present to Kepic, and subsequently to the court, a statement of accounts which they knew did not represent the net profit on the Great Lakes contract as defined in clause 9 of the employment contract. I consider that they did so fraudulently, with the clear intention of depriving Kepic of his right to share in the contract profits.

From her analysis of the evidence, I agree. In rejecting the proffered statement of accounts and finding that they were fraudulently prepared, the trial judge also rejected as fraudulent the principles upon which those calculations were based. She did not impugne the accountants' skill but rather the instructions upon which they acted. She has set out the appropriate principles for the calculation of the net profit in her order and in her reasons. I agree that any legitimate calculation must be in strict accord with the principles set forth by the trial judge. I would also add the fact these defendants acted fraudulently in presenting the statement of accounts to Kepic was cogent evidence of their fraudulent intention in inducing the breach of contract. In the circumstances, the trial concluded that the Marentettes were liable in their personal capacities.

It is well established that the directors of a corporation will not be liable for inducing that corporation to breach its contract when they are performing bona fide their functions as corporate officers. See Said v. Butt, [1920] 3 K.B. 497; Thomson & Co. Ltd. v. Deakins, [1952] 1 Ch. 6461 (C.A.). This is not the case where a director acts in a fraudulent manner. Fraudulent efforts by a director of a corporation to increase the revenue of that body cannot be said to be bona fide in its best interest. See generally Einhorn v. Westmount Investments Ltd. et al. (1969), 6 D.L.R. (3d) 71 (Sask. Q.B.), aff'd. (1970), 11 D.L.R. (3d) 509 (Sask. C.A.); McFadden v. 481782 Ontario Ltd. et al. (1984), 47 O.R. (2d) 134 (H.C.J.). After surveying the law on this question, the trial judge concluded that the Marentettes were personally liable for inducing M.B.L. to breach its agreement with Kepic. The measure for damages for such a tort is the same as that recoverable for the breach induced. See generally Asamera Oil Corp. Ltd. v. Sea Oil General Corp., [1979] 1 S.C.R. 633 at 644.

In the circumstances, the trial judge was right in holding the Marentettes personally liable for the tort of inducing a breach of the contract by their corporation.

The respondent cross-appeals. The only issue in the cross-appeal that concerned us was costs. I agree with the appellant by cross-appeal that in view of the finding by the trial judge of fraudulent conduct by Henry Marentette and Navarre Marentette inducing the breach of the contract and in presenting a deceptive statement of accounts to the court at the trial, the respondent should have his costs there and in this Court on a solicitor and client basis. The costs of the hearing before the local judge of this Court shall be on a party and party basis.

In the result then, the appeal is dismissed but the cross-appeal is allowed. The judgment in appeal stands, save that the order as to costs is varied and as varied shall provide that the respondent shall have costs at the trial on a solicitor and client basis. The respondent will have his costs on a party and party basis on the hearing before the local judge of this Court. The respondent will have his costs of the appeal on a solicitor and client basis in this Court. There will be no order as to costs on the cross-appeal.

BROOKE J.A.
BLAIR J.A.:— I agree.
TARNOPOLSKY J.A.:— I agree.

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